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10/619,676	07/15/2003	Charles J. Renz	460.2111USX	7055

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CHARLES N.J. RUGGIERO, ESQ.  
OHLANDT, GREELEY, RUGGIERO & PERLE, L.L.P.  
10th FLOOR  
ONE LANDMARK SQUARE  
STAMFORD, CT 06901-2682

EXAMINER

COOLEY, CHARLES E

ART UNIT	PAPER NUMBER
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1723

DATE MAILED: 05/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/619,676

Applicant(s)

RENZ, CHARLES J.

Examiner

Charles E. Cooley

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 31 March 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 41-63 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 41-63 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date: \_\_\_\_\_
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_

## OFFICE ACTION

### *Priority*

1. Acknowledgment is made of applicant's claim for domestic priority under 35 U.S.C. § 119(3).

### *Drawings*

2. The drawing correction was received on 31 MAR 2004 and is approved.  
Replacement sheets as outlined below are required.
3. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the tapered annular wall (added by amendment in claims 41 and 51 but considered to be new matter) must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.
4. 37 CFR 1.121 (d) requires that any drawing changes be submitted in compliance with 37 CFR 1.84 on replacement sheets as an attachment to an amendment document. An accompanying detailed explanation of all of the changes should be provided on a separate sheet in the drawing amendments or remarks section of the amendment document. A marked-up copy of one or more of the figures being amended, with annotations, may also be included to provide further explanation of the changes made. The marked-up version must be labeled as "Annotated marked-up Drawings." Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even though only one figure may be amended.

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The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per Sec. 1.84(c)) so as not to obstruct any portion of the drawing figures. If the examiner does not accept the changes, the applicant will be notified and informed of any required corrective action in the next Office action. No further drawing submission of the amended drawing figure(s) by applicant would be required, unless applicant is so notified.

### ***Specification***

5. The abstract and title are acceptable.

### ***Double Patenting***

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claims 41, 48, 51, 58, and 60-62 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-4, 12-14, 25-26, 29-30, and 31 of U.S. Patent No. 6,616,319 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because the application claims anticipate the patented claims. See *In re Goodman*, supra. Applicant agrees to file a terminal disclaimer per page 10 of the remarks filed 31 MAR 2004.

***Claim Rejections - 35 USC § 112***

8. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

9. Claims 41-63 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter that was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The subject matter added to claims 41 and 51 regarding the annular ring being at least partially tapered towards the longitudinal axis and relied upon for patentability is not supported by the originally filed disclosure. The examiner reviewed the specification and found no support for the annular ring 31 or 51 being tapered. The originally filed

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drawing figures are also not considered to support a showing of a tapered annular ring as the annular ring 31 and 51 appear to constitute a vertically disposed outer annular wall rather than a tapered wall. Claims 41-63 therefore involve new matter. Applicant's remarks filed 31 MAR 2004 do not point out where the support for the amendatory language exists in the originally filed disclosure.

***Declaration under 37 CFR 1.131***

10. The declaration filed on 31 MAR 2004 under 37 CFR 1.131 is sufficient to overcome the Johansen et al. (US D451,200) reference. Exhibit A is considered to establish adequate evidence of invention of the subject matter of the claims rejected in the first office action prior to the effective date of the Johansen et al. patent.

***Claim Rejections - 35 USC § 102***

11. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

12. Claims 41-47, 50-57, and 62-63 are rejected under 35 U.S.C. 102(b) as being anticipated by Tseng (US 5,788,369).

Absent the new matter, the patent to Tseng discloses the recited agitator with an annular wall (below 161' in Figs. 8 and 10); converging spokes 171' defining apertures;

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and a retaining flange 161'. The agitator is disposed in the open end of a container 10' with a nipple dispensing mechanism 13' and a fastening ring 141' as seen in Figures 7-10.

13. Claims 41-59 and 63 are rejected under 35 U.S.C. 102(b) as being anticipated by Swett et al. (US 3,820,692).

Absent the new matter, the patent to Swett et al. discloses the recited agitator with an annular wall 33; converging spokes 34 defining apertures, a retaining flange (the enlarged region above 33 as seen in Figure 7); the spokes having upper and lower surfaces with fins 38 thereon.

14. Claims 41-47 and 50 are rejected under 35 U.S.C. 102(e) as being anticipated by Reichner (US 1,075,119).

Absent the new matter, the patent to Reichner discloses the recited agitator with an annular wall proximate 12; converging spokes 13 defining apertures, and a retaining flange 5, 9.

\* \* \*

15. With regard to the above rejections, the claimed cooperation between the agitator and the container in claim 41 is not germane to patentability since claim 41 is drawn to the subcombination of the agitator only. Unlike claim 51, the container is not considered a positively claimed element in claim 41. Accordingly in claim 41, any cooperation between the agitator and another element does not further define the structure of the agitator subcombination.

***Allowable Subject Matter***

16. Claims 60-61 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims and if the double patenting and new matter rejections are overcome.

***Response to Arguments***

17. Applicant's arguments with respect to claims 41-63 have been considered but are moot in view of the new ground(s) of rejection. Applicant's remarks rely primarily on the tapered annular ring for patentability over the applied prior art patents, yet this feature is deemed to involve new matter.

***Conclusion***

18. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the



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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Charles E. Cooley whose telephone number is (571) 272-1139. The examiner can normally be reached on Mon-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Charles E. Cooley  
Primary Examiner  
Art Unit 1723

19 May 2004